No. 12,843

IN THE

United States Court of Appeals

For the Ninth Circuit

ILENE CHARLES, also known as Arlene Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

Title 18, United States Code, Section 3281 confers jurisdiction on the District Court, and Title 28, United States Code, Section 1291 confers appellate jurisdiction on this Honorable Court.

STATEMENT OF FACTS.

This case was tried on January 5, 1951 before the District Court of Hawaii sitting without a jury. The

Defendant was convicted of violation of Title 26, United States Code, Section 2553(a). On September 21, 1950, pursuant to a search warrant, Mr. William K. Wells, the Acting District Supervisor of the Bureau of Narcotics for the Territory of Hawaii, together with Lowell Cain and some other officers, went to the premises at 3237 Nimitz Highway, the place described in the search warrant. No attack was made on the search warrant. (R. 10.) The rear door of the premises was open and the Defendant, Ilene Charles, also known as Arlene Charles, was standing in the hallway. The Defendant slammed the door, after being notified that the officers had a warrant for her person and premises, and Officer Cain broke the door down. (R.11.) Cain testified that the defendant ran towards the bathroom, he followed, and she had her hand in the bowl of the commode and was attempting to flush it. (R. 18, 19.) Cain started throwing water out of the bowl and recovered three capsules which had not been flushed down the toilet. (R. 19.) Mr. Wells recovered a wet capsule which was stuck on the ottoman (R. 11), and Cain recovered one hypodermic needle and three glass eye-droppers. (R. 20.) The defendant made no statement incriminating herself and did not take the stand.

ARGUMENT.

The specifications of error will be taken up separately.

I. THERE WAS EVIDENCE OF VIOLATION.

Defendant contends that there was no evidence to support the averment that the drugs were not in or from an original stamped package, and offers in support thereof *Weaver v. United States,* 15 F. (2d) 38. The *Weaver* case was decided on October 16, 1926 which was before the *Casey* case (276 U.S. 413, 48 Supreme Court 373) decided April 9, 1928. In a comment on the *Casey* case contained in the decision in *Flowers v. United States,* 83 F. (2d) 78, 81, (cited in Appellant's brief), the Court said:

> "For said Mr. Justice Holmes, speaking for the Supreme Court in that case (the Casey case) where the morphine had been dissolved and soaked into a towel, 'it safely may be inferred that he (Defendant) did not proclaim his illegal purpose by putting stamps on the towels.' "

It is obvious that no stamps would be attached to capsules floating in the bowl of a commode.

Moreover, this Court has very recently decided, in *Cavness v. United States,* 187 F. (2d) 719, decided March 5, 1951, the exact question presented in the instant case. We quote briefly from the *Cavness* case:

> "Appellant next asserts that his motion for acquittal was erroneously denied since the government failed to prove that the capsules of cocaine were not in the original stamped package,

did not have requisite tax stamps on them, and did not come from the original stamped package. Fed.R.Crim.P. 29 (a, b), 18 U.S.C.A.; and see Globe Liquor Co. v. San Roman, 1948, 332 U.S. 571, 574, 68 S.Ct. 246, 92 L.Ed. 177."

"The statute under which Appellant was indicted and convicted provides that 'the absence of appropriate tax-paid stamps from * * * (cocaine) shall be prima facie evidence of a violation of this subsection by the person in whose possession' such drug is found. 53 Stat. 271 (1939), as amended, 26 U.S.C.A. §2553(a). The burden of proof is thus placed upon an accused to show lawful possession. Casey v. United States, 1928, 276 U.S. 413, 418, 48 S.Ct. 373, 72 L.Ed. 632. The record does not reveal that appellant made any effort to meet that burden."

II. NO EVIDENCE WAS WITHHELD.

Defendant complains that the actual capsules seized from the Defendant were not placed in evidence. The Defendant stipulated that the chemist's report covering these particular capsules could be admitted in evidence by consent. This was done and the chemist's report covering these particular capsules was made the United States Exhibit "A" (R. 13). No inference of withholding evidence could possibly be drawn from the facts in this case when the Defendant by consent admitted the chemist's report and agreed that the report covered the particular capsules seized from the Defendant. The cases cited by the Defendant in his brief are cases in which evidence was actually with-

held. Here it is apparent from Defendant's stipulation (R. 13) that there was no withholding of evidence in any way.

III. THERE WAS EVIDENCE OF VENUE.

Defendant again insists that it was incumbent upon the prosecution to prove the narcotics in question were in fact unstamped. This has been answered by the *Cavness* case, supra, and the *Casey* case, supra.

The Defendant then insists that the presumption of purchase arising under the statute does not carry with it the presumption that the purchase occurred in the Territory of Hawaii. Defendant cites five cases in support of this. Of these five the *Cain* case, 12 F. (2d) 280 was decided March 22, 1926; the *Donaldson* case, 23 F. (2d) 178 was decided December 2, 1927; and the *Brightman* case, 7 F. (2d) 532 was decided August 24, 1925. These three cases were all decided prior to the *Casey* case which was decided on April 9, 1928. Further, the case of *Acuna v. U. S.*, 74 F. (2d) 359 specifically holds that venue can be established by showing possession, and cites the *Casey* case. The *Flowers* case, supra, also follows the *Casey* case.

IV. THERE WAS EVIDENCE OF DEFENDANT'S POSSESSION OF THE DRUG.

Nowhere at the trial did defendant make any claim that she was not in possession of the heroin capsules named in the indictment. On the contrary, it was spe-

cifically and expressly admitted that the Defendant did have possession of these capsules. (R. 21, 22.) We quote briefly from Mr. Botts' statement to the Court:

> "* * * and I figure possibly on the showing made there is no question she had possession of the narcotics." (R. 21.)

> "* * * she is legally guilty of having possession of these narcotics." (R. 22.)

In view of the foregoing there is nothing to be inferred with reference to possession of the narcotics as she has freely admitted having possession.

V. THERE ARE NO INFERENCES BASED ON INFERENCES IN THIS RECORD.

In answer to the points raised in Defendant's last paragraph we submit:

(1) Under the *Cavness* case which followed the *Casey* case, when possession by the Defendant of unstamped narcotics has been proved, the burden is on the Defendant to show such possession was lawful. Therefore, the Court was not asked to make any presumption other than the one set out in the statute;

(2) The Court was not asked to presume that the narcotics belonged to Defendant as she freely admitted that they were in her possession;

(3) Her possession of the narcotics, unexplained, as a matter of law is *prima facie* evidence of the violation of the statute; and

(4) Under the *Casey* case the venue is in the Territory of Hawaii where she was found in possession of the narcotics.

CONCLUSION.

The evidence adduced at the trial of this case was clearly sufficient to satisfy the trial judge of the guilt of the defendant. As the judge stated (R. 23), "This woman was caught red-handed with narcotics in her possession and made an attempt to destroy the evidence, and she has been shown to be guilty."

It is respectfully submitted from all of the foregoing that the judgment of the trial court should be affirmed.

Dated, Honolulu, T. H.,
June 11, 1951.

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